

(2015) 03 MP CK 0125

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10111/2013

Shashi Prabha Pandey and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 2 JLJ 308

Hon'ble Judges : K.K. Trivedi, J.

Bench : Single Bench

Advocate : Rajendra Tiwari, Learned Senior Advocate assisted by Vineet Dubey, Learned Counsel, for the Appellant; Vaibhav Tiwari, Learned Panel Lawyer, Advocates for the Respondent

Final Decision : Allowed

Judgement

K.K. Trivedi, J.—The petitioners, working as Medical Officers in Homeopathy Branch of Indian System of Medicine and Homeopathy, 8 in numbers, have approached this Court by way of filing writ petition under Article 226 of the Constitution of India, ventilating their grievance with respect to the order dated 15.5.2013 (Annx.P/10) said to be issued by the respondent-State in Public Health and Family Welfare Department directing that while granting the promotion with retrospective effect to the persons like petitioners on the post presently held by them, they were granted the benefit of revision of pay with retrospective effect and arrears of salary was paid to them, whereas, since they were not to be granted such a monetary benefit with retrospective effect in terms of the circular of the Finance Department, on an objection, it is directed that the monetary benefit granted to the petitioners with retrospective effect is withdrawn, the said order is cancelled. As a consequence of this, it is also directed to make recovery from the petitioners. It is not in dispute that all arrears pursuant to the order of promotion and fixation of salary of the petitioners on the pay scale applicable to the promotional post was paid to the

petitioners.

2. It is the case of the petitioners that in fact they were initially appointed as Assistant Medical Officers (Homeopathy). They were required to be considered for promotion on the post of Medical Officer (Homeopathy). At the relevant time, their claims were not considered by the respondents treating as if the post for promotion were not available though the amendments were made in the Rules at the relevant time and such posts were available. Since direct recruitment was initiated, instead of granting promotion, the similarly situated persons like petitioners have filed Original Application being O.A. No. 135/1996 before the M.P. Administrative Tribunal, Bench at Bhopal. The said Original Application was pending consideration before the Tribunal when it was abolished and under the Act, the same was transmitted to this Court where it was registered as Writ Petition No. 23371/2003. The said writ petition came up for hearing before this Court on 8.8.2005 and was allowed by this Court with a specific direction to consider the cases of those petitioners and persons like them in a review Departmental Promotion Committee (hereinafter referred to as DPC for brevity) for promotion on the post of Medical Officer (Homeopathy). Since the order passed in the said petition was not complied with within the time prescribed, a Contempt Petition was filed before this Court by the said persons. During pendency of such litigation, it appears that some order was passed by the respondents granting retrospective promotion to the petitioners in that case, but with a rider of making payment of salary on the promotional post from the date of joining and further applying principle of no work no pay. That order was considered by this Court in the Contempt Petition No. 868/2007 on 9.11.2009 and it was held that those who have approached the Court were entitled to grant of monetary benefits as well on account of their retrospective promotion. It is the case of the petitioners that those persons have been paid the amount of salary from the date they were promoted.

3. Further, contention raised in the writ petition is that in the review DPC, certain other persons like petitioners were considered, were found fit for promotion and in their respect, the order was issued on 4.10.2008. Those persons were also granted the benefit of retrospective promotion with effect from 21.2.1995, but a condition was levelled against them that they will not get the salary from the date of their promotion. On the other hand, they will get the salary from the date they have joined on the post. Because of the order passed by this Court in the Contempt Case, a corrigendum order was issued on 21.12.2011 and the persons like petitioners were granted the benefit of salary from the date of retrospective promotion. All such amounts were calculated and paid to the petitioners. The present petitioners were one who were promoted by those orders and they were granted the benefit of salary from the date of retrospective promotion. There was no error committed in passing such order and there was no occasion to recall said order by the impugned order dated 15.5.2013, nor there was any question of directing recovery of the amount from the petitioners. It is, thus, contended that the order impugned is bad in law and is liable to be quashed.

4. Upon service of the notice of the writ petition, the respondents have filed their return and have contended that, the claims of promotion of petitioners were considered in the review DPC, even though they have not approached the Court of law in the matter of their promotion, extending the similar benefit though not available as was granted by the Court, to the petitioners of the Writ Petition No. 23371/2003, and the retrospective promotion was granted to the petitioners specifically directing that they will not be paid monetary benefit with retrospective effect. However, on the representations of persons like petitioners, the said condition was withdrawn by a subsequent order. This was objected to by the Finance Department and it was said that in terms of the memorandum dated 26.4.1974, persons like petitioners were not entitled to the grant of monetary benefit of arrears of salary from the retrospective date of promotion. They were entitled to the notional fixation of their pay on the promotional post and not the actual payment of salary, since they have not worked on the promotional post. In view of this, when the objections were raised by the Finance Department rightly the order was passed by the respondents rectifying the error committed in granting financial benefits to the petitioner on account of their retrospective promotion and since excess amount has already been paid to the petitioners, a direction for recovery of the same has been issued. It is contended that the interim stay was granted without hearing such objections of the respondents and, therefore, the same is liable to be vacated. The writ petition being misconceived is liable to be dismissed. Though a rejoinder has been filed by the petitioners, to meet out such a stand taken by the respondents, the note sheets have been placed on record to indicate that the claims of persons like petitioners were rightly considered and the orders were issued in their respect, but it is contended that in view of the settled position of law even after payment, recovery from the petitioners of such an amount is not permissible.

5. Heard learned counsel for the parties at length and perused the record.

6. The issue relating to the recovery of excess payment from the respondents is no longer res integra as these aspects have been considered by the Apex Court in several cases. At the initial stage, in the case of Sahib Ram Vs. State of Haryana and Others, , it was held that the employee alone will not be held responsible for receiving the amount in excess to his entitlement unless certain facts relating to misrepresentation etc. are proved. In the case of Mahendra Kumar Dubey Vs. State of M.P. and others, W.P.(S) No. 3075/2003, decided on 19.12.2008, this aspect was again considered by this Court. All these circumstances were again considered in the case of Ram Siya Kanojia Vs. State of M.P. and Others, . This Court has taken note of one more aspect which was considered by the Apex Court in the case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, , and has categorically held that in such circumstances, the recovery of the alleged excess payment from such employees was not to be made. The Apex Court in the case of Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, , has held that the amount paid from the public exchequer is neither the amount of executant of the order or of

the beneficiary and, therefore, if any loss to the public exchequer is caused, the same has to be recovered from the employee concerned. Considering various aspects as were looked into, in the case of Syed Abdul Qadir and Others Vs. State of Bihar and Others, , has dealt with the situation in which recovery could be made from the employee concerned.

7. Recently, after looking to all the previous decisions and the orders passed by the Apex Court in various cases, the Apex Court in the case of State of Punjab Vs. Rafiq Masih, , has held that it is not necessary that recovery in all cases should be ordered. In case, it is found that the excess payment has been made on account of any misrepresentation or fraud, undoubtedly, the amount of excess payment can be recovered. Various factors have to be taken into consideration while ordering the recovery against an employee and in certain circumstances, the recovery of excess payment would not be permissible, but in other cases it may be. Summarising the findings, the Apex Court has held in paragraph 12 that in certain conditions the recovery cannot be made, which reads thus:-

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group "C" and Group "D" service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

8. Keeping in view the law well settled in respect of ordering recovery, this Court has also held in the case of Smt. Sushma Pyasi Vs. State of M.P. and others, W.P. No. 1573/2012, decided on 5.3.2013, that recovery of the amount paid to the employee is not permissible and such alleged excess payment is not to be recovered from such petitioners.

9. After discussing the law in respect of the recovery, the circumstances in the

present case for issuance of the impugned order are required to be looked into. Learned Senior counsel for the petitioners has submitted that the law is well settled that once a particular Act of the respondents is found to be incorrect and a direction to remedy the wrong has been issued that direction would not be limited to only those who have come before the Court, but similar treatment is required to be granted to all similarly situated persons as has been held by the Division Bench of this Court in the case of N.K. Doongaji and Others Vs. Collector and Others, . It is submitted by learned Senior counsel for the petitioner that if once the demand was said to be bad in law in respect of persons who have approached the Court, the demand of very same nature cannot be made to the other similarly situated person, irrespective of the fact whether they have approached the Court or not.

10. Per contra, it is contended by the counsel for the respondents that the petitioners though were also affected by not considering the cases for promotion at the relevant time have not approached the Court of law in time and, therefore, the benefit of order passed in case of those who were vigilant about their claims, cannot be extended to the petitioners.

11. Such submissions of learned counsel for the parties are considered. No doubt the petitioners have not approached this Court nor have challenged the inaction of the respondent-State in not promoting them within time in M.P. Administrative Tribunal, but the fact remains that their claim was not considered only because it was treated as if the vacancies were not available for promotion of those persons. After testing such submission of the respondent-State in the case of Dr. Manzoor Ahmad and another Vs. State of Madhya Pradesh and others, O.A. No. 135/1996, which was registered as Writ Petition No. 23371/2003 (decided on 8.8.2005), this Court came to the conclusion that there was error on the part of respondents in not treating the post of Medical Officers available for promotion, whereas, such posts were lying vacant and were required to be filled in by 75% promotion and such suitable number of Assistant Medical Officers were already serving in the department, who have completed the requisite years of service for consideration of their cases for promotion on the aforesaid posts. This was in fact a direction to treat 107 posts of Medical Officers available for the purposes of promotion of Assistant Medical Officer (Homeopathy) and that being so, the non-consideration was said to be bad in law. The respondents themselves have accepted the correctness of the order passed by this Court as they have not challenged it in any higher Forum. On the other hand, in compliance of the said order, they convened the review DPC. Therefore, at the time when the review DPC was convened, they were required to consider the cases of all other eligible persons who were not considered in the previous DPC as was the case of Dr. Manzoor Ahmad (supra). Similar treatment was not to be denied to all other similarly situated persons. This Court in the case of N.K. Doongaji and others (supra) has specifically dealt with such a situation and has very categorically recorded the reasons as to why such a benefit should be extended to all the similar persons by applying the law laid down by the Courts, in para 3, which

read thus:-

"3. Before leaving this case it seems to us necessary to say that we do not appreciate the attitude of the Opponents in persisting in their demands against the petitioners even after their attention had been drawn to the decision of this Court in *Surajdin Laxmanlal Vs. State of M.P. and Others*, . That decision unmistakably and in clear words said that the recovery of surcharge on account of fuel and mahua leaves collected by the liquor contractors was wholly illegal. But strangely enough, despite this decision the opponents pressed their demand against the petitioners and on 22nd September 1960 the Under Secretary to Government in the Separate Revenue Department addressed a letter to the Excise Commissioner saying that the decision of this Court in the case of *Surajdin Laxman*, 1960 MP LJ 39 : (AIR 1960 Madh Pra 129) (supra) was "not binding on the Government in its dealing with those contractors who were not parties in the case before the High Court" and that in regard to those contractors who were not parties the "recovery of cess should continue as usual till the same is prohibited by a competent Court"" (Annex. R- 4 to the Return).

Now, it is no doubt true that a decision given by a court is binding only on the parties to the proceedings. But the Government was bound by the ratio of the decision in *Surajdin Laxmanlal Vs. State of M.P. and Others*, and the legal position expounded therein as regards the validity of the surcharge. One would have expected the Government to give effect to that decision by applying it to cases indistinguishable from the case of *Surajdin*. That they failed to do so leads only to three conclusions namely, either that the authorities did not care to read the decision of this court in *Surajdin Laxmanlal Vs. State of M.P. and Others*, or that if they did read, they failed to understand it; or that if they read and understood it, then they sought to get rid of the effect of the decision by relying on a puerile technicality. We condemn in no uncertain terms such an attitude, on the part Of the authorities indicating little respect for the decisions of this Court and desire it to be known that as often as it may be necessary we will sternly repress such an attitude.

In this connection it would be pertinent to reproduce the observations- which Chagla C.J. made in *Firm Kaluram Sitaram Vs. The Dominion of India*, while dismissing a suitor"s claim for compensation from railway administration for the loss of some silver bear due to the dishonesty of a railway employee. The learned Chief Justice said:

""Now we have often had occasion to say that when the State deals with a citizen, it should not ordinarily rely on technicalities, and if the state is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person." These remarks apply with greater force here as no legal defence of any kind was open to the respondents in resisting the petitioners" claim that the recovery sought to be made was wholly illegal. But for the recalcitrant attitude of the opponents, the petitioners would not have been driven to the necessity of

fling this petition."

12. Now, it has to be examined whether principle of "No Work no pay" would be applicable in such cases and whether the circular of the Finance Department No. F-1-2/73/Nil/4 dated 26.4.1974 would be invariably applicable in case of the petitioners, or not. The said circular though referred in the impugned order, but has not been placed on record of the writ petition by the respondents. Much emphasis is placed on the said circular by the respondents, but in what circumstances, the circular has to be applied, has not been explained in the return by the respondents. Of course, power is available to the respondent-State to put such restrictions in the matter of claim of arrears of salary by the employees of State, but the reasonable classification of those employees has to be done who would not be entitled to arrears of salary in case of retrospective promotion. If for the reasons or causes attributable to the employee, the timely promotion could not be granted to him or her, he or she may be denied the arrears of salary even in the case of retrospective promotion. But for the fault of employer, the employee is not to be denied legitimate claim of arrears of salary on retrospective promotion.

13. The Apex Court in the case of J.N. Srivastava Vs. Union of India (UOI) and Another, has dealt with such a situation though in the case of withdrawal of notice of voluntary retirement of employee, which was wrongly rejected by the employer. The abstracted part of finding and reasoning given in para 3 of report reads thus:-

"3. It was submitted by learned Senior Counsel for the respondent-authorities that no back salary should be allowed to the appellant as the appellant did not work and therefore, on the principle of "no work, no pay" this amount should not be given to the appellant. This submission of learned Senior Counsel does not bear scrutiny as the appellant was always ready and willing to work but the respondents did not allow him to work after 31.1.1990. The respondents are directed to make available all the requisite monetary benefits to the appellant as per the present order within a period of 8 weeks on the receipt of copy of this order at their end. Office shall send the same to the respondents at the earliest." This makes it logically clear that the principle of "No work, no pay" would not be applicable universally, but would apply in such cases where the employee himself was found responsible for not discharging the duties of the post. Specially in a case where the employer was in fault in not allowing the employee to work on a post carrying higher pay scale because of any reason, the principle of "No work, no pay" would not be attracted.

14. Though the specific provisions are made under Fundamental Rule 17 with respect to the date from which pay and allowances are to be paid to the employee/officer and it is specifically provided that subject to any exceptions specifically made in the Rules, the Officer shall begin to draw the pay and allowances attached to his tenure post with effect from the date when he assumes the duty of that post and ceases to draw them as soon as he ceases to

discharge those duties and further a rider is put that an officer who is absent from duty unauthorisedly shall not be entitled to any pay and allowances during the period of such absence, it has to be seen that this enumeration of the principle of "No work, no pay" has to be applied in specific circumstances. The very same principle was considered by the Apex Court in the case of Union of India Vs. K.V. Jankiraman, etc. etc., There also the memorandum issued by the Central Government in respect of grant of salary with retrospective effect, to the persons who were facing the departmental enquiry or criminal prosecution was looked into. Though here in the case in hand, neither the petitioners were facing the departmental enquiry nor a criminal prosecution and for them a different circular is made applicable, but underlying principles of making such application of the Fundamental Rule is the same; that means not performing the duty of the post and, therefore, no payment of salary of the post. The Apex Court considering various aspects has reached to the conclusion that it is not necessary that invariably an employee, who has been considered fit for promotion while was facing departmental enquiry or criminal prosecution and later on, was promoted on the said post because of his exoneration in the departmental enquiry or acquittal in the criminal prosecution would not be paid the benefit of salary of the promotional post with retrospective effect. After due deliberation, the Apex Court has said that if such a restriction is put in reference to Fundamental Rule 17, which is also applicable in the Central Government services, the legitimate claims of the employee would be taken away. It is the finding recorded by the Apex Court that in case such a retrospective promotion is required to be granted, analysis of such a claim should be done and all consideration is required to be done keeping in mind the circumstances in which timely promotion was not granted to the employee. If the employee is ultimately found not responsible to such a delay, he would be entitled to the monetary benefits as well.

15. If that analogy is made applicable here in the case in hand, the fact remains that the respondents themselves have considered all these aspects when the representations were made by the persons like petitioners, the note sheets were written a precis was prepared, the same was placed before the Government and ultimately it was decided that persons like petitioners be extended the monetary benefit from the date of promotion. In view of this, again the orders were issued by the respondents in case of some of other employees like petitioners. If it is examined whether the rightful consideration of the petitioners was done or not, it would be amply clear that the principle of "No work, no pay" was not to be made applicable in the case of present petitioners and, as such, there was no occasion to issue the impugned order in their respect.

16. In light of the aforesaid, if the justification of impugned order explained by the respondent is seen, on 4.10.2008, the order of promotion was issued in respect of persons like petitioners stating that the review DPC was held by following the criteria as were adopted by the DPC of 10.10.1994. That means with retrospective effect the claims were considered for promotion. Pursuance to the said DPC of 1994, the Assistant Medical Officers (Homeopathy) were

promoted on the next higher post of Medical Officer (Homeopathy) on 21.2.1995. That benefit was extended to the petitioners also with retrospective effect, but only with a rider that they will not get the arrears of the salary on the application of principle of no work no pay. This aspect was also considered by this Court in the case of Dr. Manzoor Ahmad (supra) and this was specifically ordered by this Court in paragraph 7 of the said order that in case the persons are found fit for promotion, they were to be granted the promotion with all the consequential benefits. In the Contempt Case, the correctness of the order passed by the respondents in the case of Dr. Manzoor Ahmad (supra) was tested and it was held that once the consequential benefits are allowed, the principle of no work no pay cannot be made applicable. Considering these aspects, the respondents themselves have passed the order on 21.12.2011 and granted promotion to the petitioners with all the monetary benefits with retrospective effect and removed the said condition made applicable in the order dated 4.10.2008. In such circumstances when the arrears were paid to the petitioners, there was no occasion for the respondents to recall that order and to direct recovery from the petitioners. For these peculiar circumstances, if the ratio laid down by the Apex Court in the case of State of Punjab and others etc. Vs. Rafiq Masih (White Washer) etc. (supra) is made applicable, the recovery from the petitioners was not permissible. As such, the order dated 15.5.2013 cannot be said to be just and proper order.

17. In view of the discussions made herein above, the writ petition is allowed. The impugned order dated 15.5.2013 (Annx.P/10) is hereby quashed. No recovery whatsoever is made from the petitioners pursuant to the interim protection granted by this Court, therefore, no recovery be made from the petitioner.

18. The writ petition stands allowed and disposed of. There shall be no order as to costs.